IN THE

Supreme Court of the United States

Term, 1949.

No. 132 - 133

FLORENCE T. SMITH and JOHN M. SMITH, her husband, BENJAMIN D. FENIMORE, BENJAMIN D. FENIMORE, Administrator of the Estate of Benjamin John Fenimore, Deceased, BENJAMIN D. FENIMORE, Administrator of the Estate of Benjamin John Fenimore, Deceased, Trustee ad litem for Benjamin D. Fenimore and Elizabeth S. Fenimore, his wife; and FRANCIS A. SMITH,

Respondents,

v.

PHILADELPHIA TRANSPORTATION COMPANY,

Petitioner,

v.

BENJAMIN D. FENIMORE,

Respondent.

ABIGAIL STERNER,

Respondent.

v.

PHILADELPHIA TRANSPORTATION COMPANY,

Petitioner,

v.

BENJAMIN D. FENIMORE,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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STATUTE CITED.

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ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Justices of the Supreme Court of the United States:

Philadelphia Transportation Company, a corporation organized under the laws of the Commonwealth of Pennsylvania, having presented in the within captioned matter a petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review judgments affirming judgments of the United States District Court for the Eastern District of Pennsylvania, Benjamin D. Fenimore, Benjamin D. Fenimore, Administrator of the Estate of Benjamin John Fenimore, Deceased, Benjamin D. Fenimore, Administrator of the Estate of Benjamin John Fenimore, Deceased, Trustee ad litem for Benjamin D. Fenimore and Elizabeth S. Fenimore, his wife, make answer to the allegations contained in said petition for writ of certiorari as follows:

COUNTER SUMMARY STATEMENT OF THE MATTER INVOLVED.

As set out in the petition for writ of certiorari by the Philadelphia Transportation Company, the facts relating to the accident are substantially correct except that the summary statement of the matter involved fails to set out that Mr. Fenimore had never been over the highway before, was unfamiliar with the route and that the highway is a great industrial artery of travel in Eastern Pennsylvania. The petitioner's statement of facts fails to disclose that the trolley car, in approaching this congested highway, though operated by a motorman thoroughly familiar with the crossing, did not stop before entering the intersection (Record, pages 71a, 84a, 146a) and that when the operator of the trolley car saw the westbound motor traffic in the inner lane, he applied the brakes and jumped toward the

exit door, leaving the controls unattended (Record, page 100a).

The statement by the Philadelphia Transportation Company also fails to point out that at the point where the accident occurred, there was no street or intersection where the trolley car crosses (Record, page 112a). The tracks were level with the bed of the highway and there was nothing to differentiate the crossing from the pavement of the highway generally (Record, pages 113a, 132a) and further fails to point out that at every crossing of this Industrial Highway from Philadelphia to Chester, except at the point where the accident occurred, there is either a stop sign against the street entering the Industrial Highway or a traffic light controlling the intersection (Record, page 113a). At the scene of the accident, the road itself passes through open country with swampland on both sides of the road (Record, pages 65a, 67a).

The Philadelphia Transportation Company points out in its summary that the crossing is indicated by official highway signs posted on the north or right hand lane at a distance of two hundred twenty-four feet (224′) and ninety-eight feet (98′) from the tracks, but fails to state that there were no signs on the left side of the southbound lane used by Mr. Fenimore while proceeding westwardly which would indicate the presence of a railway or trolley crossing at the site of the accident (Record, page 121a) and that he could not see the warning signs along the outside lane because his view was obstructed by a large truck running parallel with him (Record, page 120a).

STATEMENT OF BASIS UPON WHICH IT IS CONTENDED THE COURT HAS JURISDICTION.

The Philadelphia Transportation Company, in its petition for writ of certiorari, under this heading states that the case involves an important question of local law which has been resolved by the Third Circuit in a way which is in conflict with applicable local decisions, which ruling, con-

tends the Philadelphia Transportation Company in its petition, is in conflict with the settled law of Pennsylvania.

It is respectfully submitted that the ruling of the Third Circuit Court affirming the District Court is in conformity with the settled law of Pennsylvania.

COUNTER STATEMENT OF QUESTIONS PRESENTED.

Where a motorist, traveling on a dual lane highway for the first time, in the inside lane thereof to the left of a large panel body truck traveling in the outside lane and parallel with the motorist which stops suddenly at a grade crossing to avoid collision with an interurban trolley crossing the dual lane highway without stopping and invisible to the motorist until the moment of collision, collides with said interurban trolley.

(1) Does not the evidence, viewed in the light most favorable to the motorist, clearly indicate that the question of negligence on the part of the motorist is one of fact to be determined by a Jury?

ANSWER TO REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The Philadelphia Transportation Company, throughout this case, has taken the position that the law in Pennsylvania having to do with the duty of a motorist to look and listen immediately before entering each set of tracks and to have his car under such control that he can stop it if a trolley car is approaching is absolute and inflexible. Throughout the case and in this petition, the Philadelphia Transportation Company has contended that the law of Pennsylvania gives trolley cars a "divine right-of-way". This is not the law of Pennsylvania.

As pointed out by the Philadelphia Transportation Company in this petition, the opinion of the Circuit Court recognized that there were special circumstances in this case which succinctly put, meant that Mr. Fenimore, a

stranger to the scene, legally using the inner lane of a dual highway, deprived of notice of the existence of the trolley crossing by lack of signs visible to him, traveling at a lawful rate of speed, is suddenly met with a trolley car, heretofore invisible to him, crossing a busy highway without stopping. These were the facts as testified to by the witnesses and the District Court and the Circuit Court held that they were questions of fact for the Jury in determining the question of negligence on the part of Mr. Fenimore, and this is in conformity with the controlling law in the State of Pennsylvania.

The Philadelphia Transportation Company contends in this petition that the "inflexible" and "unbending rule to be observed at all times and under all circumstances" requires a motorist to look and listen immediately before crossing tracks and to proceed at his peril. It has been contended by counsel for Mr. Fenimore and others throughout this case that such is not the inflexible rule in Pennsylvania and that if it were, then double lines of traffic on dual highways would be useless and the inner lane could never move because its view would always be obstructed by traffic in the outer lane. That this rule is not inflexible and that dual highways must present special circumstances is recognized by the Commonwealth of Pennsylvania in its statutory enactment of *June 27, 1939, P. L. 1135, Section 24, 75 Purdon's Statutes 543, Section C,* where it is enacted

> "The driver of a vehicle shall not overtake or pass any other vehicle proceeding in the same direction at any railroad grade crossing * * * except on a highway having two (2) or more lanes for movement of traffic in one direction, the driver of a vehicle may overtake or pass another vehicle."

The leading case in Pennsylvania which applies to the set of circumstances in the present case is *Rea, Appellant v. Pittsburgh Railways Company,* 146 Pa. Sup. Ct. 252, 22 A. (2) 68 (1941). In this case, the court considers at length

the rule of law holding that an absolute duty is imposed upon a motorist to look for street cars immediately before going on the track and the failure to do so is negligence per se. The Court in that case says that if these cases laying down the aforementioned rule of law be examined, it will be found that they have to do with the drivers of vehicles in the ordinary intersection of two streets with occasional varying conditions insufficient to effect the "absolute" or unbending application of the rule where the facts are clear. The Court goes on to say:

> "But this was no ordinary intersection of two lines of travel as the undisputed facts and the plot in evidence will show. * * * Traffic from two boulevards and from many streets, a number of which are main arteries of travel from the east, converge in the neighborhood of the crossing. * * * Sixth Avenue also is subject to much interstate traffic because of its access to the Liberty Tunnels. * * *
>
> "In the light of all the attendant circumstances, we think the question of plaintiff's negligence was for the jury."

The intersection in question in the *Rea* case was a dual highway. There were three lanes of traffic southbound. All motor traffic was stopped by a red light. When it turned green, all three lanes of traffic proceeded southwardly. The plaintiff was in the west lane of the southbound traffic. The trolley car was proceeding from the east. As all three lanes of traffic proceeded into the intersection, the plaintiff motorist could not see to the east because of the intervening lanes of traffic—exactly the same situation as in our case—except that in the *Rea* case concededly the plaintiff knew of the existence of the trolley tracks. As the three lanes of traffic proceeded across the trolley car tracks, the automobile to the left of the plaintiff stopped suddenly just as happened in this case. The plaintiff in the westerly lane of traffic did not have time to stop and there was a collision just as

in our case. The only difference in the two cases was that in the *Rea* case, there were traffic signals and the plaintiff knew of the existence of the tracks. In our case, there were no signals and the motorist did not know of the existence of the tracks. The significance of the *Rea* case, in addition to demonstrating that the superior right-of-way of trolley cars is not absolute and inflexible, is that it recognizes and states the rule in regard to trolley crossings at the intersection with highways carrying dual lanes of traffic, and the Court, in laying down the rule is such cases, says:

> "If there was an absolute duty on every driver of an automobile to enter upon defendant's tracks *in this intersection* only after he had seen for himself that there was no street car approaching, the purpose of the traffic signals near the intersection *and the utility of the multiple lanes of travel would be defeated.* Conceivably during rush hours every driver in two of the three lanes would have to come to a stop and await an opportunity for an unobstructed view along defendant's tracks before proceeding, thus causing unnecessary congestion with possible increased hazards of travel.
>
> "• • • we think whether that duty was imposed upon plaintiff was not one of law for the court, but for the jury in applying the test of reasonable diligence and care under the circumstances." (Emphasis supplied.)

and the court reversed the judgment n. o. v.

In the present case if under the circumstances, the rule requiring motorists to stop and look both ways at each trolley track is absolute, the whole purpose of dual traffic lanes would be defeated. No motorist in any lane could ever see *both ways* when traffic was moving in all lanes and no motorist could ever see conditions on the tracks on the side where his view was blocked by other moving traffic in the dual lanes. It is therefore respectfully submitted that the

rule that the motorist must yield the superior right-of-way to a street railway car is not absolute but its applicability is to be determined by the circumstances, and where the circumstances are as they were in the present case, the matter is for the jury just as was done in this case.

The petitioner herein asserts that the Court of Appeals misinterpreted the decision of the Supreme Court of Pennsylvania in the case of *Kindt v. Reading Co.*, 352 Pa. 419, 43 A. (2d) 145 (1945) and attempts to differentiate the facts in the case of *Rea v. Pittsburgh Railways Company, supra,* as well the petitioner must, for these cases alone successfully answer petitioner's contention that trolley cars have an absolute right-of-way, and we respectfully submit that the *Kindt* case clearly holds that the circumstances must be carefully considered and no general statement concerning the superior rights of trolley cars nor the failure to see a grade crossing can be applied to all cases which come to the Courts of Pennsylvania, and in the *Kindt* case, *supra,* it was said:

> "When this court held that a person on a vehicle *approaching a crossing* must be 'consciously listening' for warning signals, it did not mean to imply that persons riding in vehicles must *always* be 'consciously listening' for warning signals. It meant that they must listen for such signals whenever it is reasonable to believe that other moving objects may possibly be approaching them. If the driver of a car knows or has reason to believe that he is approaching a railroad crossing or a through thoroughfare, he must, of course, 'stop, look and listen.' If he reasonably believes he is on a quiet country road far away from all traffic, he does not have to 'consciously listen' for warning signals. In the instant case the evidence satisfied both the court and the jury that these plaintiffs did not know or have adequate reason to know that they were about to cross a railroad. The degree of attentiveness to which the law holds them must be determined by that

fact. If they were not chargeable with the knowledge of the presence of a railroad crossing, the duty to 'stop, look and listen' at that point was not cast upon them."

It logically follows then that if Mr. Fenimore did not have adequate reason to know he was approaching a railroad crossing, then he was not bound to slow his vehicle to twenty miles per hour, nor was he under the obligation imposed by cases cited by the counsel for the petitioner herein, that where a man cannot see what is coming on the tracks, he is bound to stop and listen. This rule obviously applies only to those who know or have adequate reason to know of the existence of the railroad.

It follows, therefore, that in the present case, it was the duty of the jury to determine from the evidence whether or not Mr. Fenimore had adequate reason to know he was approaching a railroad before any of the duties of a motorist about to cross a grade crossing can be thrust upon him. Evidence shows that his view was obstructed by the truck for about twelve hundred feet (1200′) prior to the crossing, and that although this highway is one-way and wide enough for three lanes of traffic, only those in the right-hand lane had benefit of any warning signs. There was no warning sign on the left-hand side of the one-way highway. Evidence showed that the tracks were flush with a black top macadam highway and the color of the right of way is in no way distinguishable from that of the surface of the highway (Record, page 113a).

The petitioner herein further argues that Mr. Fenimore is guilty of negligence for passing a truck that was slowing down. It appears from testimony that Fenimore had a clear vision of what was directly ahead. The truck's slowing down in itself did not necessitate Fenimore's perceiving a dangerous situation was in the making. The truck could be slowing down for a number of reasons: to change drivers, motor trouble, a soft tire, a bad bump in the right-hand lane, or many reasons independent of the conclusions

drawn by counsel that it must spring from the fact that there was an obstruction in front of the truck driver that would eventually become an obstruction to Mr. Fenimore. The respondents contend that it is not "reasonably likely" that someone or something would come from the swamp land on Fenimore's right and cross the highway at a point at least a half mile from the nearest dwellings without warning. His mere passing of a truck which was slowing down does not convict him of negligence. At the most a determination of the inferences to be drawn from these facts was for the jury.

The petitioner's entire case in this Court rests on its contention that the Trial Court and the Court of Appeals should have declared the driver of the automobile, Mr. Fenimore, guilty of contributory negligence as a matter of law. In the case of *Reidinger v. Lewis Jones, Inc., et al.*, 353 Pa. 298, 45 A. (2d) 3, (1945), it is said:

> "Contributory negligence will be declared only where it is so clear that reasonable minds cannot differ as to its existence."

The petitioner here contends that the rule in Pennsylvania is that regardless of circumstances, where a motorist is struck immediately upon entering trolley tracks, he is guilty of contributory negligence as a matter of law and must be declared so by the Courts. This is not the law. As a matter of fact, in Pennsylvania in an action in trespass, it is for the Jury to fix the negligence of the defendant. Under no circumstances may a Judge direct a verdict for the plaintiff on oral testimony. The petitioner here is seeking a directed verdict for the petitioner against Mr. Fenimore on oral testimony.

The leading authority for this proposition of law may be found in the opinion in *Nanty-Glo Boro. v. American Surety Company*, 309 Pa. 236. In that case, in an opinion by Mr. Justice Drew, the Court said at page 238:

"In granting plaintiff's motion for binding instructions, the trial judge assumed the testimony of Carlisle and Estep to be true. This he had no right to do, even though it was uncontradicted. In the words of Mr. Justice Sharswood, 'However clear and indisputable may be the proof when it depends on oral testimony, it is nevertheless the province of the jury to decide, under instructions from the court, as to the law applicable to the facts, and subject to the salutary power of the court to award a new trial if they should deem the verdict contrary to the weight of the evidence': Reel v. Elder, 62 Pa. 308. This rule is firmly established: Second National Bank v. Hoffman, 229 Pa. 429; Newman v. Romanelli, 244 Pa. 147; McGlinn Distilling Co. v. Dervin, 260 Pa. 414; see Phila. v. Ray, 266 Pa. 345. The credibility of these witnesses, without whose testimony plaintiff could not have recovered, was for the jury, and plaintiff's motion for binding instructions should not have been granted."

This principle of law was followed in *Schnitzer v. Philadelphia Transportation Company* (et al., Appellant), 354 Pa. 576.

This rule of law was again cited with approval in *Kostello v. Kostello, Appellant,* 159 Pa. Sup. Ct. 194. In that case at page 196 the court entered an opinion by Arnold, J., who said:

"The triers made no findings establishing the facts of this defense of 'violation of positive orders.' In other words, the testimony of the defendant and his son was not believed. It is true that their testimony was uncontradicted but there is not and can never be a rule that the triers of the facts (either an administrative body or jury) *must* accept as true uncontradicted oral evidence."

The Supreme Court of Pennsylvania, as late of January 3, 1949, in the case of *Martino v. Adourian,* 360 Pa. 580,

63 A. (2d) 12, reviewed the decisions having to do with the matter of declaring a person contributorily negligent as a matter of law and said:

> "This Court has decided in many cases that contributory negligence may be declared judicially only where it is so clearly revealed that fair and reasonable individuals could not disagree as to its existence: Altomari v. Kruger, et al., 325 Pa. 235, 188 A. 828; Pessolano, et ux. v. Philadelphia Transportation Company, 349 Pa. 73, 36 A. (2d) 497; DiBona Administrator v. Philadelphia Transportation Company, 356 Pa. 204, 51 A. (2) 768."

Here the petitioner is complaining of want of care on the part of another when it was solely its own lack of care which caused the accident. Its motorman, knowing of the existence of the Industrial Highway, knowing that there were two lanes for westbound traffic, knowing that each lane might be occupied, knowing that his view of the inner lane was obstructed by the truck, had the responsibility of anticipating that there might be traffic in the inner lane and should have stopped his trolley car before entering the highway and made certain that the trolley car was at least visible to both lanes of traffic.

In *Wagner, Appellant v. Philadelphia Transportation Company,* (this same petitioner), the Supreme Court of Pennsylvania in 252 Pa. 354, 97 A. 471 (1916) said:

> "No one can complain of want of care of another where care is only rendered necessary by his own wrongful act * * * In such case the plaintiff was not bound to anticipate the negligent act of the motorman of the car on the near track in failing to look in the direction in which his car was approaching and to keep it under proper control."

and this is exactly what the petitioner is seeking when it asks that this motorist be declared contributorily negligent as a matter of law.

CONCLUSION.

The petitioner herein is seeking to reverse the District Court and the Circuit Court of Appeals, alleging that the decision in this case as it now stands is in conflict with the settled law of Pennsylvania. We have pointed out in this answer that not only is the decision not in conflict but it is in conformity with the law in Pennsylvania.

The petitioner here is seeking to have the Court resolve a question of fact without submitting it to a Jury and the petitioner points out that the Trial Judge mentioned that there was some question of doubt on the matter of contributory negligence as a matter of law and further points to the dissenting opinion in the United States Court of Appeals for the Third Circuit. We submit that the doubt in the mind of the Trial Judge arose from the facts and circumstances. We submit that viewed in the best light for the petitioner herein (to which view it is not legally entitled), it indicates doubt in the minds of the Justices of the United States Circuit Court of Appeals. Everything in these circumstances points to doubt, not to lack of it, and it is questions of doubt which must always be resolved by juries in Pennsylvania and the United States.

Respectfully submitted,

JOHN V. DIGGINS,
Attorney for Respondents.